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No. 21307

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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FLUOR CORPORATION, LTD., ET AL
UNION TANK CAR COMPANY
DRAGOR SHIPPING CORPORATION, a corporation, formerly Ward Industries Corporation,

Appellants
Cross Appellees

vs.

U.S.A., EX REL MOSHER STEEL COMPANY,

Appellee
Cross Appellants

No. 21307
No. 21307 A
No. 21307 B
No. 21307 C

JOINT ANSWERING BRIEF OF CROSS APPELLEES

UNION TANK CAR COMPANY, FLUOR CORPORATION, LTD., AND THE SURETIES

Upon Appeal from the District Court of the United States, for the District of Arizona

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court to entertain this cross appeal has been invoked pursuant to Sections 1291 and 2107 of Title 28, U.S.C. The jurisdiction of the District Court was invoked pursuant to Sections 270(a) and (b) of Title 40, U.S.C., commonly known as the Miller Act, as to Count I of the Amended Complaint, and Section 1332, Title 28, U.S.C., as to Counts II

through VII of the Amended Complaint (R. 268). The District Court, in its Conclusion of Law No. 1 (R. 6, p. 1237), held that jurisdiction existed with respect to all claims asserted by plaintiff against the defendants.

STATEMENT OF THE CASE

Inasmuch as the legal question presented by this cross appeal is practically identical with respect to Union Tank Car Company, and Fluor Corporation and the Sureties, these cross appellants are filing a joint answering brief on this issue.

The sole question presented is whether, in the event the judgment below is not reversed, Mosher Steel Company is entitled to recover statutory interest from the March 28, 1962 date on which plaintiff's alleged claims purportedly became due rather than from the May 24, 1966 date on which judgment was entered below. The parties herein have presented full and complete statements of the case in their main briefs. In order to avoid burdensome repetition, only those facts particularly pertinent to the limited cross appeal issue are set out below.

This action was filed by the use plaintiff, Mosher Steel Company, on January 23, 1963 to recover the sum of $321,053.54 (R. 1680). Of this amount $298,336.58 was sought from defendants Ward Industries Corporation, Union Tank Car Company, and Fluor Corporation, Ltd. and its sureties, for furnishing, fabricating and delivering steel used in the Titan II, Phase II, Missile site work at Davis-Monthan Air Force Base, Tucson, Arizona, and $22,716.96 was sought from defendants Union and Ward for furnishing, fabricating and delivering steel used in the similar work at Vandenberg Air Force Base, Lompoc, California. Judgment was ultimately entered on May 24, 1966 against defend-

ants Ward and Union in the amount of $268,882.92 and against defendant Fluor and its sureties in the amount of $246,165.96 (R. 1240).

Plaintiff's seven-count amended complaint (R. 268-80) alleged four alternative theories of recovery against Union: (1) That Union requested Mosher to perform the subject work for the IMI-Ward joint venture and had agreed to pay for the same upon completion thereof (Counts II and IV, R. 271, 275); (2) That Union had orally promised to guarantee the account of IMI-Ward with the intention of not honoring its promise in order to induce Mosher to accept purchase orders from the joint venture (Count V, R. 275); (3) That Union and IMI-Ward had entered into a third party beneficiary agreement for the benefit of Mosher whereby Union agreed to pay Mosher and IMI-Ward agreed that such payment would be deducted from funds coming due to the joint venture (Count VI, R. 277); and (4) That under a February 5 agreement approved by the court in the IMI bankruptcy, Union undertook to pay Mosher for fabricated steel deliveries made after IMI's institution of bankruptcy proceedings (Count VII, R. 278).

Union's answer to the amended complaint denied that any of the alleged agreements or promises had been made and further denied that all or any of the amounts claimed was due and owing the plaintiff (R. 1095). As further defenses, Union pleaded (1) that any alleged guaranty contract was invalid by reason of the statute of frauds (R. 1099); (2) that any alleged third party beneficiary contract was rendered unenforceable because of the joint venture's default and for want of funds due the joint venture out of which to pay plaintiff (R. 1101-2); and (3) that plaintiff was estopped to assert a claim against Union by reason of having elected in the bankruptcy court to treat the indebtedness

in question as the primary and individual responsibility of IMI (R. 1098-9). Substantial defenses were also presented in the answers filed by Union's co-defendants Fluor Corporation, Ltd. and Ward Industries Corporation.

The case was tried to the court without a jury, commencing November 18, 1964 and ending December 4, 1964. During the course of the trial Mosher was unable to establish the dollar amount of its claim because it had no substantial evidence of the value of the IMI stock distributed during the California bankruptcy proceedings, the value of which stock constituted a credit and reduction in the amount of its claim. In this regard the court advised plaintiff's counsel (R. 449):

> "It appears in the record the plaintiff has received something on the transaction that gives rise to its claim and certainly there would be a credit on it. As to what the credit would be that is a matter of your proof. If counsel can stipulate on something, fine, but otherwise I think, you will have to show the proper credit."

The court thereupon gave plaintiff an opportunity to postpone the closing of its case in order to secure the necessary evidence. Later plaintiff's counsel advised the court (R. 681), "Your Honor, we have been unable to find any probative evidence on the subject." This deficiency in proof was only obviated when counsel for defendants agreed to stipulate as to the value of the stock distributed "in order to come to an expeditious conclusion" of the case (R. 682).

On May 24, 1966, eighteen months after the trial, the court below entered findings of fact and conclusions of law holding all defendants liable to Mosher (R. 1220-40). However, the trial court denied an allowance of

prejudgment interest on any of the claims asserted against defendants, holding as its Conclusion of Law No. 15 (R. 1240):

> "Inasmuch as Mosher's claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to entry of the judgment herein."

Mosher thereupon moved to amend the court's findings and conclusions so as to provide for the allowance of prejudgment interest commencing from March 28, 1962 (R. 1266). It is from the denial of that motion and the judgment denying the additional interest sought that Mosher has taken this cross appeal.

SPECIFICATION OF ALLEGED ERROR

Whether the District Court erred in denying recovery of prejudgment interest on the ground that Mosher's claims against defendants were unliquidated where the record establishes that both the validity and the amount of the claims were at all times in substantial dispute.

ARGUMENT

SOLE POINT

The District Court, in its Conclusion No. 15, did not err in refusing to allow prejudgment interest.

In urging this Court to amend or modify the District Court's judgment insofar as it relates to the date from which interest should be computed, Mosher belabors the familiar rule that liquidated claims bear interest from the date they become due. This indulgence in question begging affords no help in determining whether that rule is applicable under the facts and circumstances of this case.

These appellants have no quarrel with Mosher's assertion that prejudgment interest in this action is allowable only to the extent provided by the law of Arizona. Nor does Union dispute that the general rule in Arizona is as set forth in *United States Fidelity & Guaranty Co. v. California-Arizona Co.,* 21 Ariz. 172, 186 P. 502 (1920), that if the claim is liquidated "interest should be computed from the time the debt became due." However, under Arizona law a claim is not deemed liquidated unless liability is definitely fixed, and the amount thereof is established by mere computation rather than evidence. By definition, no such claim was asserted in the present case where the validity and amount at all times have been controverted and in dispute. *U.S.F. & G. Co., supra.*

Appellee first sought to bring the question of interest before the court after judgment, when it filed (R. 1266) a Motion requesting the court to make an additional finding that the plaintiff's charges were liquidated, and to amend Conclusion No. 15 which provided, that Mosher's claim against all parties were unliquidated. In the memorandum accompanying the motion, appellee conceded that the allowance of prejudgment interest in the Federal Courts is governed by the law of the State where the contract is to be performed (R. 1269).

The motion was denied by the court.

That Mosher's claims were not "liquidated" is demonstrated by the Arizona Supreme Court decision in *U.S.F. & G.,* which is so strikingly similar to the instant case as in our opinion to be dispositive of this cross appeal. There the defendant, in connection with a contract to improve city streets, executed two surety bonds: one for faithful performance of the contract, and another for payment of materials furnished and work done by

materialmen and subcontractors. After completion of the improvements but before all subcontractors were paid, the general contractor was adjudged bankrupt. Warren Brothers, one of the subcontractors, filed suit against the surety and recovered on its claim for "services of an inspector who performed certain duties with respect to the improvement" and for royalties for use of "a patented material for laying . . . paving." With respect to the latter portion of the claim, a substantial dispute existed whether royalties were to be computed on the basis of 25¢ or 20¢ per square yard of paving. This matter was only resolved through a trial stipulation which fixed the rate employed in determining the amount of the judgment.

On its appeal the surety assigned two errors, the first being that the trial court erred in allowing the claim for royalties on the theory that a royalty is neither labor nor material as contemplated by the bond, and the second being that the court erred in allowing interest on the claims from the date of their filing with the municipality (i.e., the date they became due), on the theory that they were "not capable of definite ascertainment as to validity or amount until the rendition of judgment."

The court held against the surety company on the first assignment of error, ruling that royalty charges fall within the purport of the bond, but held for the surety company on the second assignment by reversing the trial court's holding that interest be imposed from the date the debt allegedly became due. In arriving at the latter determination the court said:

> "The adjudicated cases present a bewildering variety of rulings with respect to the time from which interest should be computed. The statutes of this state regulate only the rate of interest and

> are silent as to the time from which it is to be allowed. Both the validity and the amount of the claims in this case were disputed by the surety company. It is apparent, therefore, that this is not a case where the amount of recovery, if recovery be had, was definitely fixed by agreement of the parties or capable of ascertainment by mere computation. * * * In cases of this character the better rule seems to be that interest is to be computed from the time of the commencement of the action, and we think that rule should be applied in this case."*

In the instant case, as in the *U.S.F. & G.* case, both the validity and the amount of the claim were very much in dispute and in both cases the extent of the latter, if recovery was to be had, was determined by stipulation during the trial. With respect to validity, aside from the defenses pleaded at the trial and referred to above, no court could determine whether or not Mosher's claim had been satisfied in the IMI bankruptcy proceedings until the value of certain stock received by Mosher was determined. Mosher admitted on the record that this value was not subject to proof.

Accordingly this case does not present a situation where the validity of the claim is not seriously disputed, as in *Weston & Brooker Co. v. Continental Casualty Co.*, 303 F. 2d 91 (C.A.4, 1962), cited by cross appallant. In that case defendant by "sworn answers to interrogatories admitted the indebtedness" and "convinced the [trial] court that [it] was engaged in dilatory tactics

* The court allowed interest from the date on which suit was filed on the theory that such date controlled when the claim in question was unliquidated in nature. This rule was subsequently modified in *Schwartz v. Schwerin*, 85 Ariz. 242, 250, 336 P. 2d 144 (1959), so that interest on an unliquidated claim now runs in Arizona only from the date on which judgment is rendered rather than from the date of filing suit. This is in accordance with the prevailing rule in most jurisdictions. *Schwartz* reviews all Arizona decision on the point.

and that it had no valid defense to plaintiff's claim (p. 92). In approving the trial court's imposition of interest from the date the debt became due, the court noted, ". . . that defendant was but delaying the inevitable" and ". . . was not energetically seeking to throw light on the facts at issue" (p. 93).

With respect to the amount of the claim, the record demonstrates that the amount in question was anything but liquidated. Mosher conceded that its claim was uncertain by its pleadings. It originally filed suit against Union, et al. on January 23, 1963 to recover the sum of $298,336.58 (R. 2). On June 5, 1964 it amended its complaint (R. 268) to claim $321,053.54 allegedly owed for fabricating steel on both the Tucson and Vandenberg jobs (R. 1680) (U. Ex. D).

Furthermore, on December 31, 1962 the referee in bankruptcy, pursuant to a plan of arrangement, ordered issued to Mosher as a general unsecured creditor 642,107 shares of IMI stock (U. Ex. E). IMI thereafter changed its name to Allied Equities Corporation and issued the stock in a 1 for 20 "reverse split" whereby Mosher received 32,105 shares (R. 1237). However, the value of these shares ($52,170.62) was not established until December 1, 1964, when the defendants stipulated a value because Mosher conceded it had no probative evidence (R.T. 681, 682). This was nearly two years after the commencement of this litigation and nearly three years after the date of the amount was allegedly due. In this respect the fact situation in the present case is once again virtually identical with that in *U.S.F. & G.*, where the amount of plaintiff's claim could not be computed without a trial stipulation concerning the rate to be paid for paving.

Mosher was content to let the case go to judgment

without the matter of the credit for IMI stock being taken into consideration. Its pre-trial memorandum (R. 228) states:

> "The Plaintiff's position is that the court should adjudicate which party in this action shall be given credit for the value of said stock, if and when said stock is received by Plaintiff."

At the trial the following transpired (Tr. 681):

"MR. PURNELL: One final thing, Your Honor, before plaintiff rests. The matter of the stock or value of the stock. Does the Court deem that that is a part of the plaintiff's case at this time or does the Court agree with the plaintiff's position in its pre-trial memorandum that that value should be determined at a later time?

THE COURT: I believe if you are to offer evidence as to the value, now is the time.

MR. PURNELL: Now is the time to do it. Your Honor, we have been unable to find any probative evidence on the subject. The defendants have offered to stipulate that the shares are worth one dollar and five-eights ——

MR. LOTTERMAN: You say the defendants have offered to stipulate?

MR. PURNELL: I beg your pardon, Mr. Warnock.

MR. LOTTERMAN: This is the first I have heard of it.

MR. PURNELL: Mr. Warnock and Mr. McConnell. We don't think that the plaintiff could, actually ever could and certainly cannot now obtain that much money for it, but under the circumstances, the nature of the matter is such we feel that all of the doubt should be resolved in favor of the defendants on this score

and we are prepared to stipulate that the shares were worth a dollar and five-eights at the time they were received."

Mosher's reliance on *Sam Macri & Sons, Inc. v. United States of America,* 313 F. 2d 119 (C.A.9, 1963) and *American Surety Co. of New York v. United States,* 368 F. 2d 475 (C.A.9, 1965) is misplaced because those cases involved Alaska and Nevada law and concerned only the rule applicable where setoffs or counterclaims are raised as a defense to *admittedly liquidated* claims for relief. They have no application in the present case where the claims of the plaintiff have been in dispute on both the issue of validity and of amount.

CONCLUSION

We respectfully submit that the *U.S.F. & G.* and *Schwartz* cases fully establish that the trial court did not err in refusing to allow prejudgment interest in this action. Accordingly, the District Court's judgment, insofar as it relates to this limited cross appeal issue, should be affirmed.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Counsel